aid to the stomach and kidneys; and their effectiveness to expel poisons from the blood.

On April 10, 1937, no claimant having appeared, judgments of condemnation were entered and it was ordered that the products be destroyed.

M. L. WILSON, *Acting Secretary of Agriculture.*

27376. Misbranding of Alberty's Calcatine, Alberty's Liver Cell Salts, Alberty's Lebara Organic Pellets, and Alberty's Anti-Diabetic Vegetable Compound Capsules. U. S. v. Mrs. Adah Alberty (Alberty Food Laboratories). Tried to a jury. Verdict of guilty. Fine, $1,000 and costs. Affirmed by Circuit Court of Appeals. (F. & D. no. 32879. Sample nos. 34867–A to 34871–A, incl., 37305–A, 38255–A, 38256–A, 41209–A.)

The labelings of these products bore false and fraudulent curative and therapeutic claims.

On October 31, 1934, the United States attorney for the Southern District of California, acting upon a report by the Secretary of Agriculture, filed in the district court an information against Mrs. Adah Alberty, trading as the Alberty Food Laboratories, alleging shipment by said defendant in violation of the Food and Drugs Act as amended, between the dates of March 25, 1932, and April 5, 1933, from the State of California into the States of Pennsylvania, Washington, and Minnesota of quantities of the above-named products which were misbranded. The articles were labeled in part variously: "Alberty's Calcatine. A Cell and Tissue Salts * * * Alberty's Food Laboratories, Los Angeles"; "Alberty's Liver Cell Salts * * * Alberty Food Laboratories * * * Los Angeles"; "Alberty's Calcatine Different Elements Organic Calcium * * * Alberty's Food Laboratories * * * Hollywood, Calif."; "Alberty's Lebara Organic Pellets Formerly Liver Cell Salts * * * Alberty Food Laboratories * * * Hollywood, Calif."; "Alberty's Anti-Diabetic Vegetable Compound Capsules * * * Manufactured for The Alberty Food Laboratories * * * Hollywood, Calif."

Analyses of samples of the articles by this Department showed that Alberty's Calcatine consisted essentially of milk sugar, a small proportion of calcium phosphate, traces of compounds of iron, magnesium, sodium, and potassium, and chlorides; Alberty's Liver Cell Salts consisted essentially of milk sugar, a small proportion of calcium phosphate, and traces of compounds of iron, magnesium, sodium, and potassium, and chlorides; Alberty's Lebara Organic Pellets consisted essentially of milk sugar, a small proportion of calcium phosphate, traces of compounds of iron, magnesium, sodium, and potassium, and a trace of chloride; Alberty's Anti-Diabetic Vegetable Compound Capsules consisted essentially of powdered plant material, including leaf, stem, and root tissues, and possibly a fruit or seed tissue.

The articles were alleged to be misbranded in that certain statements in the labeling regarding their curative and therapeutic effects were false and fraudulent in the following respects: The bottle label of one lot of the Calcatine falsely and fraudulently represented that the article was effective as a cell and tissue salts; effective as a remedy for the growing organism and as a corrective of constitutional defects; effective as a treatment, remedy, and cure for acidosis, indigestion, calcium starvation, diarrhea, brain irritation, and teething in children; and effective as a tonic in acute diseases, constitutional weaknesses, emaciation, bone diseases, and scrofulous and tubercular tendencies; the bottle label of the remaining shipments of Calcatine falsely and fraudulently represented that the article was effective as a treatment, remedy, and cure for calcium deficiency and as an aid in the treatment of acidosis and ailments of the teeth and bones; the bottle label of the Liver Cell Salts falsely and fraudulently represented that the article was effective as a treatment, remedy, and cure for malarial disorders, biliousness and diseases of the liver and uric acid diathesis and for ailments marked by excessive secretion of bile and derangement of the liver, gravel, sand in the uterine [urine], biliousness, headache with vomiting of bile, bitter taste, diabetes, trouble arising from living in damp places, malaria, and gout; the bottle label of the Lebara Organic Pellets falsely and fraudulently represented that the article was effective as a liver cell salts, as an aid in the treatment of acidosis, dormant liver, bile secretions, and in clearing the complexion; and that the box label of the Anti-Diabetic Vegetable Compound Capsules falsely and fraudulently represented that the article was effective as a treatment, remedy, and cure for diabetes.

The defendant having entered a plea of not guilty and a jury having been sworn, the trial was commenced on December 4, 1936. The court recessed and the trial was resumed on December 7, and was completed December 10, 1936, on which date the jury returned a verdict of guilty on all counts. On December 14, 1936, counsel for the defendant moved for an arrest of judgment and this motion having been denied, moved for a new trial which was argued and also was denied. The court thereupon imposed a fine of $1,000 and costs. On appeal to the Circuit Court of Appeals for the Ninth Circuit, the judgment of the district court was affirmed on July 19, 1937, with the following opinion:

DENMAN, *Circuit Judge:* Appellant, Mrs. Adah Alberty, was convicted on ten counts of an information charging violations of the Food and Drugs Act, 34 Stat. 769 (21 USCA §§2, 10) in that she shipped in interstate commerce certain articles wilfully misbranded. The articles were Alberty's Calcatine, labeled to be used for acidosis, indigestion, "calcium starvation", diarrhea, brain irritation, and a number of other afflictions; Alberty's Liver Cell Salts for "Ailments marked by excessive secretions of bile and derangement of the liver, gravel, sand in the uterine, biliousness, headache with vomiting of bile, bitter taste, diabetes, trouble arising from living in damp places, malaria, gout"; Alberty's Lebara Organic Pellets for acidosis, dormant liver, and other ills; and Alberty's Anti-Diabetic Vegetable Compound Capsules. This last material purported, apparently, to be effective only for diabetes.

Appellant, without requesting the giving of an instruction for a verdict for defendant, and without claiming in her assignments of error that there is no sufficient evidence to warrant the verdict, asks us to review the 178 pages of testimony in the transcript to determine whether there is such sufficiency. Her counsel asserts that he undertook the defense in this criminal case without preparing himself in Federal procedure, to the extent of making available for his client this elementary requirement. The frankness of counsel's admission is commendable. Aside from a lack of knowledge of procedure the record shows a well conducted defense below and here. However, if such a claim were a cure for error, it would tend to encourage the presence in federal trials of lawyers who relied upon their knowledge of state procedure and neglected the preliminary study of that of the federal courts.

Under our rules a claim of plain error may at our discretion be considered though not assigned. However, it is essential that at least *the claim is plain.* Here appellant's brief makes general statements as to inferences to be drawn from the testimony, but neither cites the testimony itself nor refers to the pages of the long transcript in which it appears. Wiborg v. U. S. 163 U. S. 632, and other cases cited, where the discretion has been exercised, have been cases of offenses involving imprisonment for considerable terms. Here there are mere fines of $100 for each violation of a statute creating misdemeanors, and we see no abuse of discretion in declining to ignore the absence of the request for the instruction and the assignment of error.

The assignments of error raise questions as to the admissibility of certain evidence, the propriety of questions by government counsel and certain of the court's remarks and instructions.

It was stipulated that the materials mentioned were shipped in interstate commerce by the defendant. The government offered in evidence certain books or pamphlets which were also shipped in interstate commerce and generally distributed. These were "Calcium, the Staff of Life", "Alberty's Treatment for Diabetes", and "The Hourglass." The defendant was the author of these works. They dealt with the necessity for and the use of the articles charged to be misbranded, although they were not sent with or attached to the articles.

Appellant asserts error in the admission of this literature by reason of its irrelevancy and prejudicial character. The evidence was not irrelevant. The indictment presented the issue whether the claims on the labels were false and fraudulent. It was properly admissible to show defendant's knowledge as to the truth or falsity of such claims made on the labels of the articles which she is charged to have misbranded. Obviously if false and extravagent claims as to Calcatine, for example, were made in a a pamphlet spread abroad by the defendant, it would be persuasive evidence that similar claims on the brand of the article itself were false and fraudulent. Mitchell v. U. S. (CCA-2), 229 Fed. 361, and cases cited.

Save for excerpts, the court's instructions to the jury are not set out, so we presume that they were correctly instructed as to the evidence offered.

Error is assigned to the following question put to defendant, a witness in her own behalf, by government counsel:

Q. Now, Mrs. Alberty, I will ask you if you don't know it to be a fact, after you came to Los Angeles and the Alberty's Foods [a product not involved in this case] were distributed to infants here, that dozens upon dozens of babies were taken to the then City Health Department right across the street from this building and there had to be treated as a result of taking Alberty's Food?

A. Absolutely no. I never ever heard of it.

Such questions well could be deemed improper. They too frequently occur in the heat of criminal causes. However, here the appellant apparently was satisfied with a negative answer and did nothing. That concluded the matter. Whatever hesitation counsel may have regarding a claim of misconduct of a trial judge, there should be none in claiming it against the prosecutor. It should be made at once. The court should be given the opportunity for instant correction and, if the offense be sufficiently hurtful, declare a mistrial. Counsel cannot occupy the instruments of justice, the court and jury, in an extended trial and, without objection or motion for relief, raise such questions on appeal.

Error is assigned to a portion of the cross-examination of George Hyland, pharmacist, a defense witness. The government was permitted to ask and receive an affirmative answer to the question whether there was not at that time a charge against him of manufacturing and selling some of the same material which the defendant was accused of misbranding. There was no exception to the admission of this testimony, so it would not have to be considered. However, the record shows that the court limited the effect of the evidence to the question of the witness' interest or bias in the case. So limited, it was entirely proper.

The defendant complains of the action of government counsel in repeatedly attempting to bring out facts showing the large profit allegedly made by the defendant in the sale of her articles. The court excluded testimony on this factor and instructed the jury that the element of profit was not an element of the offense, and that they could not consider it other than that it might "furnish a motive for the defendant to do what otherwise she might not have done." The instruction was not excepted to. There is no basis for assuming that the conduct of counsel in asking questions on this aspect of the case was prejudicial, in view of the fact that the testimony was excluded and the matter covered by an instruction of which no complaint was made.

There were other assignments, based on remarks of the court, upon certain items of evidence, and matters contained in the court's instructions. They are relatively minor points and it is not made to appear that there was any prejudice to the appellant in the matters alleged. In any case they were not properly objected or excepted to in the court below.

The court sentenced the defendant to pay a total of $1,000 fine ($100 on each count) and the costs of prosecution, amounting to $1,499.80, making a total judgment of $2,499.80. Error is assigned to this assessment of costs. There is nothing to the assignment. R. S. §974 (28 USCA §822) provides that upon conviction for any offense not capital, the court may award the costs of prosecution against the defendant. Appellant says the award was so excessive as to be a cruel and unusual punishment. There is nothing in the record to bear out that statement.

Affirmed.

M. L. WILSON, *Acting Secretary of Agriculture.*

27377. Misbranding of Experimental OK'd Farm Astringent Tablets. U. S. v. Albert T. Peters and Paul S. Casey (Vitamineral Products Co.). Plea of nolo contendere. Fine, $50 and costs. (F. & D. no. 36084. Sample no. 23038–B.)

The labeling of this product bore false and fraudulent representations regarding its curative or therapeutic effects.

On February 3, 1936, the United States attorney for the Southern District of Illinois, acting upon a report by the Secretary of Agriculture, filed in the district court an information against Albert T. Peters and Paul S. Casey, copartners, trading as Vitamineral Products Co., Peoria, Ill., charging shipment by said defendants in violation of the Food and Drugs Act as amended, on or about February 21, 1935, from the State of Illinois into the State of Minnesota of a quantity of Experimental Ok'd Farm Astringent Tablets that were misbranded.

Analysis showed that the article contained sodium chloride (approximately 89 percent), boric acid (5.3 percent), and malachite green dye.